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NO. 85-236

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

HARRY EICHENLAUB,
Petitioner

v.

DAVID ALAN YURKY,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS ZIMMERMAN AND WICKER IN PARTIAL SUPPORT OF PETITIONER

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LeROY S. ZIMMERMAN
Attorney General

AMY ZAPP
Deputy Attorney General

JOHN G. KNORR, III
Senior Deputy Attorney General

ANDREW S. GORDON
Chief Deputy Attorney General
Counsel of Record

Counsel for Respondents
Zimmerman and Wicker

Office of Attorney General
15th Floor Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

QUESTION PRESENTED

Whether a pre-trial detainee who is transferred from a county jail to another prison for security reasons is entitled to a hearing prior to or shortly after the transfer to protect his rights to effective assistance of counsel and a speedy trial when the detainee has available to him in the pending criminal proceeding adequate measures to safeguard his Sixth Amendment rights.

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OPINIONS BELOW

The opinions of the Court of Appeals and the District Court are unreported. Copies of those opinions are reproduced in the appendix to the petition for certiorari, respectively, at pages 1a-20a, and 1b-16b.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1985. The petition for writ of certiorari was filed within 90 days of that date, and the writ was granted on January 13, 1986. This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. Constitutional Provision Involved

The Sixth Amendment to the Constitution provides in relevant part as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI.

II. Statute Involved

The Civil Rights Act of 1871, as amended, provides in pertinent part as follows:

> Every person, who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (Supp. III 1979).

STATEMENT OF THE CASE

On January 8, 1982, petitioner Harry W. Eichenlaub, warden of the Clinton County Jail, (J.A. 78-79),[1] transferred respondent, David Alan Yurky, a pre-trial detainee in his

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[1] "J.A." refers to the Joint Appendix submitted by the parties. The designation, "P.A.", used throughout this brief, refers to the appendix to the petition for certiorari. Where a pertinent portion of the record is not reproduced in either place, citation will be made directly to the document referenced. Because in some instances the record contains more than one affidavit or unsworn declaration from the same individual, the document referenced will be identified by date where appropriate.

custody,[2] to the State Correctional Institution at Huntingdon, Pennsylvania, a state prison some 60 miles away.[3] Respondents Charles H. Zimmerman and Emanuel C. Wicker were employed as prison administrators at the state

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[2]At all times relevant to this action, Yurky was incarcerated as a pre-trial detainee. See (Affidavit of David A. Yurky, dated March 28, 1984, at ¶¶ 1-5). He was convicted of the crimes with which he was then charged and is presently a prisoner in state custody.

[3]The District Court took judicial notice of the various distances involved in this case, (P.A. 19b), and the relevant information is summarized here. A detailed discussion of those distances can be found in the Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment and in Support of Cross-Motion of Defendants Zimmerman and Wicker for Summary Judgment, filed April 16, 1984, at p. 5, n. 9 and p. 13, n.17. The Court of Appeals did not dispute either the District Court's action in this respect or the relevant information.

prison.[4] Eichenlaub carried out the transfer on an emergency basis for security reasons[5] with the prior

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[4]For all times relevant here, respondents Zimmerman and Wicker were employed, respectively, as Superintendent and Deputy Superintendent for Operations at the state prison. (J.A. 95, 103). These respondents will be referred to collectively as "the state prison officials" throughout this brief.

[5]Eichenlaub took this action based on staff reports that Yurky's conduct in the jail indicated he might be planning to escape and on information he received from the state police, which indicated that Yurky had ties to the Palestine Liberation Organization; was skilled in the martial arts; was in possession of a passport to Lebanon at the time of his arrest; had criminal charges pending against him in Centre County; had exceptionally high bail set; and was expected to be charged in federal court with bank robbery in the near future. In his judgment, the county jail, an older, minimum security facility, was not secure enough to house Yurky. Eichenlaub rejected other options such as a transfer to a neighboring county jail or to a closer minimum security state prison for the same reason. (J.A. 62-66; 75-76).

approval of the Clinton County Court of Common Pleas.[6] (J.A. 61-66). Neither of the state prison officials had any involvement in the decision to transfer Yurky, and they were required by state law to receive him into their custody.[7]

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[6]Pennsylvania law requires that the court of common pleas for the county in which a jail is located give its consent prior to the transfer of a prisoner from the county jail to a state prison. See Pa. Stat. Ann. tit. 61, § 72 (Purdon Supp. 1985). That consent may be obtained ex parte. Prior to transferring Yurky, Eichenlaub contacted a judge of the Clinton County Court of Common Pleas by telephone and relayed the reasons for the transfer. The judge orally approved the transfer at that time and signed the appropriate document the next business day. (J.A. 62-65; Declaration of Curtis C. Carson at Exhibit III).

[7]Under Pennsylvania law, only the Deputy Commissioner of the state Department of Corrections may authorize the transfer of a prisoner from a county jail. See Pa. Stat. Ann. tit. 61, § 72 (Purdon Supp. 1985), as amended by Pa. Stat. Ann. tit. 71, § 310.1 (Purdon Supp. 1985). That individual approved Yurky's transfer here. (J.A. 66-67).

(FOOTNOTE CONTINUED ON NEXT PAGE)

At the time of the transfer, Yurky had criminal actions pending against him in two different counties. He had had a preliminary hearing earlier the same day in Clinton County on charges of conspiracy and criminal complicity. Immediately following that proceeding, Yurky was arraigned in a neighboring jurisdiction, Centre County, on robbery charges. (Affidavit of David A. Yurky, dated March 28, 1984, at ¶¶ 1-4).

(FOOTNOTE CONTINUED)

When a transfer has been approved by the Deputy Commissioner, the administrators of a particular state prison, such as the state officials here, may not refuse to accept custody of the prisoner. See Pa. Stat. Ann. tit. 61, § 74 (Purdon Supp. 1985), and (J.A. 95-97; 103-04).

Yurky's counsel in the Clinton County matter was an attorney located in the same town as the county jail.[8] As the result of the transfer, Yurky was incarcerated a little more than an hour's drive away from his attorney. A different attorney, from a town about 25 miles away from the Clinton County Jail, represented him on the Centre County charges.[9] The transfer to the state

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[8]The Clinton County Jail and Yurky's attorney on the Clinton County charges were both located in Lock Haven, Pennsylvania. See (Complaint at p. 4; in Yurky's Response to the Commonwealth Defendants' Interrogatories, filed November 18, 1982, at p. 18, no. 17; and Affidavit of David Yurky dated April 26, 1984 at ¶ 9).

[9]Yurky's Center County Attorney was located in Bellefonte, Pennsylvania. (Yurky's Response to the Commonwealth Defendants' Interrogatories, filed November 18, 1982, at p. 18, no. 17; Affivdavit of David Yurky, dated April 26, 1984 at ¶ 10).

prison increased the distance between Yurky and his counsel in that case by only about 15 miles.

At no time before or after the transfer was Yurky provided with a hearing specifically for the purpose of considering what effect the transfer might have on his Sixth Amendment rights to counsel and speedy trial in either of his pending criminal matters.[10]

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[10]Not long after Yurky's arrival at the state prison, an institutional hearing was held relating to his placement within the prison. It did not in any way concern the propriety of his transfer but was strictly limited to the question of custodial classification. (Declaration of Terry W. Henry).

While at the state prison, Yurky had a virtually unlimited ability to correspond with his attorneys[11] and

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[11]The state prison regulations then in effect provided all prisoners with a monthly allotment of free postage and placed no limit on the amount of postage-paid correspondence a prisoner could send. See 37 Pa. Code §§ 93.22(a) and (b). (Copies of relevant regulations may be found in the Addendum to this brief.) If an inmate wished to send legal mail such as correspondence to his attorney but had exhausted his monthly postage allotment and had no funds to pay for postage, the prison would post the correspondence and allow him to pay for the postage at a later time when he had funds to do so. (J.A. 99-101). A prisoner's mail to and from an attorney was treated as privileged and, absent certain extraordinary circumstances not involved here, was opened only in his presence and only to check for contraband. See 37 Pa. Code §§ 93.24-93.25.

During Yurky's first month at the state prison, he received legal mail on five different occasions. (Declaration of Curtis C. Carson at ¶¶ 15(h) and Exhibit V).

could receive visits from them.[12] He was also permitted to place telephone calls.[13]

Yurky was convicted in both counties of the crimes with which he had been charged. The record does not reflect that Yurky ever contended in the trial court or in his direct appeals that his Sixth Amendment rights had been

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[12]State regulations not only permitted Yurky to receive visits from his attorneys in circumstances that preserved the confidentiality of communications but also allowed visits to be arranged outside of normal visiting hours. See 37 Pa. Code §§ 93.3(a) and 93.71-93.74. There is no contention here that Yurky was ever denied a visit from any of his attorneys at the state prison.

[13]An inmate's counsellor determined the number and frequency of phone calls permitted for the prisoner. See 37 Pa. Code § 93.13(a). In his first month at the state prison, Yurky was permitted two calls. (Declaration of Curtis C. Carson at ¶ 15(g) and Exhibit V). The record here reflects no emergency situation relating to either of his pending criminal matters which necessitated communication by telephone.

violated. In post-verdict motions relating to his Clinton County conviction, he contended, inter alia, that he had been denied the effective assistance of counsel as the result of his transfer from the county jail to the state prison. He asserted that the transfer and resulting conditions of confinement at the state prison impeded his ability to participate effectively in pre-trial preparation with his attorney. The court rejected his claim and found, to the contrary, that Yurky had been afforded the effective assistance of counsel. See Commonwealth v. Yurky, No. 2-82, slip op. at 13-16 (Clinton Co., filed Apr. 22, 1983).[14]

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[14] A copy of this opinion was appended to the Brief of Harry W. Eichenlaub in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Harry W. Eichenlaub's Motion for Summary Judgment, filed May 10, 1984.

On May 26, 1982, the prisoner commenced this suit, a civil rights action pursuant to 42 U.S.C. § 1983 against the petitioner, the state prison officials named here, and several other county and state officials,[15] claiming, inter alia, that he was denied due process because he was not given a hearing at or near the time of his transfer on the effect of that transfer on his Sixth Amendment rights; and that, as a result of the transfer, he was denied the effective assistance of counsel in the criminal matters then pending against him.[16]

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[15]These additional officials were dismissed in the preliminary stages in this suit, and their dismissal is not now questioned.

[16]He also raised claims pertaining solely to the dismissed defendants which were also dismissed, and a due process claim against the state prison officials relating to his placement in the state prison that is not before the Court.

On cross-motions for summary judgment, the District Court concluded that in neither respect had the prisoner's rights been violated and entered judgment for Eichenlaub and the state prison officals. (P.A. 6b-12b, 186-19b). The Court of Appeals affirmed the District Court's judgment on the effective assistance of counsel claim. (P.A. 17a-18a). On the transfer-related due process claim, it affirmed the District Court as to the state prison officials, holding that those officials had no obligation to provide any necessary process. (P.A. 12a-13a). However, as to Eichenlaub, it reversed the District Court's judgment. (P.A. 8a-12a).

The Court of Appeals held that Eichenlaub was required by the Sixth Amendment to provide Yurky with a hearing, independent of the prison system, specifically for the purpose of evaluating the effect of his transfer on his rights to effective assistance of counsel and speedy trial in his pending criminal actions. The Court of Appeals reiterated its earlier holding in Cobb v. Aytch, 643 F.2d 946 (3d Cir. 1981), that the Sixth Amendment requires that before (or in emergency situations immediately after) a pre-trial detainee is transferred from a county jail to a state prison, he be afforded notice and a hearing before a tribunal independent of the prison system to weigh the need for the transfer against the possible detriment to the defendant's Sixth Amendment rights. The hearing mandated

by Cobb, and required here, is a hearing separate from and in addition to the detainee's pending criminal proceedings. (P.A. 8a-12a).[17]

The petitioner's request for a writ of certiorari was granted on January 13, 1986.

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[17]In Cobb the Court did not indicate what tribunal should afford the hearing. Because, as we have previously mentioned, Pennsylvania law relating to transfers of county jail prisoners requires the prior consent of the county court of common pleas, the Court of Appeals suggested that court as an appropriate tribunal but did not so require. See 643 F.2d at 961. Thus, under its ruling, any type of tribunal so long as it is independent of the prison system will suffice. However, regardless of whether the hearing is provided by the court suggested in Cobb or by another entity, the net effect is identical--an additional, separate hearing must be afforded a defendant to evaluate the effect of a transfer on his Sixth Amendment rights.

SUMMARY OF ARGUMENT

I. Whenever a pre-trial detainee is transferred from a county jail to another prison and believes that, as the result of the transfer, he is being deprived of his Sixth Amendment rights to effective assistance of counsel or a speedy trial, he may seek relief in his pending criminal action. The separate, additional process mandated by the Court of Appeals prior to a transfer is, in light of those existing rights, completely unnecessary.

Moreover, it is especially appropriate that a detainee be required to enforce his Sixth Amendment rights as part of his pending criminal action because any determination of whether those rights have been violated necessarily turns on the particular

facts of his case. The trial court before which that matter is pending, being familiar with pertinent developments, is best able to make an informed decision in a relatively efficient manner. For these reasons, this Court should reject the separate system of transfer-related procedures created by the Court of Appeals, and should reverse its judgment as to the petitioner.

II. If, in the alternative, this Court determines that the separate system of process required by the Court of Appeals should have been afforded to Yurky, it should also conclude that it was petitioner, the county official responsible for transferring him, not the state officials who merely received

them into their custody, who had the responsibility to ensure that the required process was afforded. That there was an emergency transfer in this case is irrelevant; transferring county officials who have first-hand knowledge of the reasons for a transfer are best able to articulate the need for the transfer before an appropriate tribunal.

ARGUMENT

I. A PRE-TRIAL DETAINEE WHO IS TRANSFERRED FROM A COUNTY JAIL TO ANOTHER PRISON NEED NOT BE AFFORDED A HEARING SPECIFICALLY TO SAFEGUARD HIS SIXTH AMENDMENT RIGHTS TO COUNSEL AND SPEEDY TRIAL BECAUSE HE HAS ADEQUATE, EXISTING MEANS AVAILABLE TO HIM AS PART OF THE CRIMINAL JUSTICE PROCESS TO ENFORCE THOSE RIGHTS.

A. Introduction

This Court has made it clear that a person accused of a crime may be incarcerated before any adjudication of guilt. See Gerstein v. Pugh, 420 U.S. 103, 111-14 (1975); United States v. Marion, 404 U.S. 307, 320 (1971). As a consequence of that incarceration, pre-trial detainees are subject to the legitimate measures employed by prison administrators to achieve the "essential

goals" of maintaining institutional security and preserving order and discipline. Bell v. Wolfish, 441 U.S. 520, 546-48 (1979). When, because of concerns for security, it becomes necessary to transfer a pre-trial detainee to another prison, there may be an effect on the detainee's Sixth Amendment rights to effective assistance of counsel, see Gideon v. Wainwright, 372 U.S. 335 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938); Powell v. Alabama, 287 U.S. 45 (1932), and a speedy trial, see Klopfer v. North Carolina, 386 U.S. 213 (1967).

As the result of a transfer, a detainee may have insufficient pre-trial access to his attorney for the formulation and preparation of his defense and thus be denied the effective

assistance of counsel.[18] See Maine v. Moulton, No. 84-786, slip op. at 9 (Dec. 10, 1985); Powell v. Alabama, 287 U.S. at 59. Or disposition of the charges pending against him might be unduly prolonged. Klopfer v. North Carolina, 386 U.S. at 221-26. This case presents the question of what means are constitutionally required to protect their rights.

The Court of Appeals, relying on its decision in Cobb v. Aytch, 643 F.2d 946 (3d Cir. 1981), held that the

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[18]Clearly, not every transfer will be detrimental to a detainee. To the contrary, the result may be salutory. He might be moved to a prison with the same or closer proximity to his counsel or may enjoy greater access to his attorney as the result of the operational procedures at the new prison.

Constitution requires that a hearing be held before a tribunal independent of the prison system before a pre-trial detainee may be transferred. In so holding, that court has mandated the creation of a procedural mechanism outside the inter-prison transfer system and apart from the procedures that are available in the underlying criminal proceeding. What this conclusion ignores is that the constitutional rights to counsel and speedy trial in criminal proceedings are enforceable as a part of the pending criminal action. As we show below, it makes no sense, either constitutionally or practically, to mandate creation of a separate system to safeguard the defendant's rights.

B. A Pre-Trial Detainee Who is Transferred From A County Jail to a State Prison is Fully Able to Enforce His Sixth Amendment Rights to Counsel and Speedy Trial As Part of His Pending Criminal Action and No Additional Process for That Purpose Is Required

In requiring that a pre-trial detainee be provided separate, transfer-related process to protect his rights to effective assistance of counsel and a speedy trial, the Court of Appeals inexplicably ignored the critical fact that the detainee has at his disposal adequate means to enforce those rights as part of his pending criminal action. The separate procedures mandated by the Court of Appeals are purely duplicative and unnecessary.[19]

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[19]The Court of Appeals seems to have reasoned that the Sixth Amendment creates a liberty interest in favor of

(FOOTNOTE CONTINUED NEXT PAGE)

Whenever a detainee who is transferred to another place of incarceration believes that, because of the transfer, he is being denied his rights to effective assistance of counsel or a speedy trial, he or his attorney may promptly rectify the situation by requesting appropriate

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(FOOTNOTE CONTINUED)

pre-trial detainees requiring notice and a hearing prior to (or shortly after) a transfer. Quite apart from the impracticality of this result which we discuss in the text, the Court of Appeals' decision apparently proceeds on the flawed premise that so long as a hearing is held and the transfer is sufficiently rational to pass due process standards, a detainee's Sixth Amendment rights may be compromised. This result demonstrates the incongruity of creating procedural requirements separate from the criminal proceeding in which Sixth Amendment concerns are paramount.

relief from the court in which the criminal charges are pending.[20] See Pa. R.Crim.P. 306.[21] For example, if

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[20]The Court of Appeals expressly imposed a requirement for a "prior" or "prompt" hearing. (P.A. 8a). Absent a state created liberty interest, a prison transfer does not itself amount to a deprivation of liberty. Olim v. Wakinekona, 461 U.S. 238 (1983), and as the decision below demonstrates (P.A. 17a-18a), a transfer does not invariably (or even frequently) deprive a detainee of his Sixth Amendment rights. The pending criminal proceeding offers a tranferred prisoner a forum for prompt review prior to any meaningful diminution of his Sixth Amendment Protections.

[21]The Pennsylvania rules of criminal procedure not only permit, but require, a defendant to bring all requests for pre-trial relief to the attention of the court in which charges are pending in a prompt manner. While those rules contemplate the filing of a single, omnibus motion within 30 days of a defendant's arraignment, they allow for additional pre-trial requests where neither the grounds nor the opportunity for filing a request for relief existed within the specified period of time. Other than the above restrictions as to form and time for filing, the rules of procedure contain no limitation on obtaining relief prior to trial which is necessary to cure a problem resulting from a detainee's transfer to another institution. See Pa. R.Crim.P. 306 and 307.

preparation of the case requires that the detainee have greater access to his attorney than the prison in which he is confined allows, he or his attorney may request that the trial court direct prison administrators to permit his attorney additional access.

Similarly, if the problem is that increased distance between the detainee and his counsel prevents them from conferring with sufficient frequency prior to trial, he or his attorney can ask the trial court to fashion an appropriate remedy. The detainee could be moved, possibly on a temporary basis, to another institution closer to his counsel; or, if he has court-appointed counsel, a request can be made that the court allot additional funds for travel by his attorney to the place of confinement. Thus, by requesting appropriate relief from the court in

which criminal charges are pending, a detainee can promptly and fully enforce his right to effective assistance of counsel as part of the ongoing criminal proceedings.[22]

Additionally, there is no question that a detainee may also enforce his right to a speedy trial in precisely the same manner. See Commonwealth v. Baines, 480 Pa. 26, 389 A.2d 68 (1978). In Pennsylvania, the right to a speedy trial generally requires that a defendant be brought to trial within 180 days of the date on which the

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[22]In Yurky's post-conviction proceedings stemming from his Clinton County conviction, the Court implicitly acknowledged that Yurky could have brought any impairment of his right to counsel caused by his transfer to its attention pre-trial, but did not. Commonwealth v. Yurky, slip op. at 15.

criminal complaint is filed. See Pa. R.Crim.P. 1100. The Pennsylvania Supreme Court stated in Baines that where a defendant is not brought to trial within that period of time and no extension of time has been granted, the appropriate remedy is for the defendant to file a pre-trial motion for relief.

Following trial, if the detainee is ultimately convicted, he may seek redress in a number of ways for any claimed deprivation of his rights resulting from a transfer. First, he may raise a claim of this sort as part of post-verdict motions, see Pa. R.Crim.P. 1123, and thereafter, in a direct appeal. See Commonwealth ex rel. Shadd v. Myers, 423 Pa. 82, 89-90, 223 A.2d 296, 300 (1966) (acknowledging that a criminal defendant has an absolute right to appeal from a conviction and

judgment of sentence). Depending on the particular circumstances of his case, he may be able to pursue other statutory or common law post-conviction remedies as well. See 42 Pa. Cons. Stat. Ann. §§ 9541- 9551 (Purdon 1982).[23] After

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[23]The Pennsylvania Post Conviction Hearing Act, 42 Pa. Cons. Stat. Ann. §§ 9541-9551 (Purdon 1982), expressly creates post-conviction procedures to redress deprivations of due process which generally replace common law writs of habeas corpus and coram nobis. See 42 Pa. Cons. Stat. Ann. § 9542 (Purdon 1982). That act permits individuals who are convicted and incarcerated or are on probation or parole, to obtain review of claimed deprivations of due process in their criminal actions, if the claims have not been finally litigated, or waived. See 42 Pa. Cons. Stat. Ann. §§ 9543-44 (Purdon 1982). Individuals who have been convicted but who have not received any of the above sentences, and who are therefore outside the provisions of the act, may nevertheless, use common law writs of habeas corpus and coram nobis to seek redress. See Commonwealth v. Sheehan, 446 Pa. 35, 285 A.2d 465 (1971).

he has exhausted his available state remedies, he may then seek review in federal habeas corpus proceedings. See 28 U.S.C. § 2254.

With all of these avenues already available to a pre-trial detainee to enforce his Sixth Amendment rights, it is clear that the additional process required by the Court of Appeals serves no good or valid purpose. This being the case, the Court should reject the conclusion of the Court of Appeals that a hearing, separate from and in addition to procedures available in the pending criminal action, should have been provided Yurky to safeguard his Sixth Amendment rights.

C. A Pre-Trial Detainee Should Be Required To Enforce His Sixth Amendment Rights As Part of His Pending Criminal Action Because Any Determination Regarding Those Rights Must Necessarily Be Based on The Particular Facts of That Case.

Because the Sixth Amendment rights involved here are inextricably related to the due process guaranteed a criminal defendant by the Constitution, it is especially appropriate that the court in which criminal charges are pending consider any claim that the defendant has been deprived of those rights as the result of a transfer to another prison.

Both the right to effective assistance of counsel and the right to speedy trial exist as components of a criminal defendant's constitutional right to due process. Argersinger v.

Hamlin, 407 U.S. 25 (1972); Klopfer v. North Carolina, 386 U.S. at 993; Gideon v. Wainwright, 372 U.S. at 342-45. What each of these rights means, in practical terms, requires a case-by-case determination. Strickland v. Washington, 466 U.S. 668, 690 (1984); Barker v. Wingo, 407 U.S. 514, 519-28 (1972).

"Not every restriction on counsel's time or opportunity to investigate, or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel." Morris v. Slappy, 461 U.S. 1, 11 (1983), citing Chambers v. Maroney, 399 U.S. 42, 53-54 (1970). Similarly, not every delay in the criminal proceedings deprives a defendant of his right to a speedy trial. Barker v. Wingo, 407 U.S.

at 519-23. Whether particular events or circumstances effectively deny a defendant either of those rights must be judged on the facts of each case.[24]

The court in which criminal charges are pending has the best perspective from which to make an informed decision about whether a change in a detainee's place of confinement truly deprives the detainee of his Sixth Amendment rights. Because the related

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[24]In this respect, this Court pointed out in Strickland that claims of ineffective assistance of counsel must be measured in terms of whether on the facts of a given case an attorney's conduct was outside the "wide range of professionally competent assistance." 466 U.S. at 690. Similarly, in Barker, the Court observed that speedy trial cases require ad hoc review and the application of a four-factor balancing test focusing on certain critical facts in each case, namely: "Length of delay, reason for delay, defendant's assertion of his right [to a speedy trial] and prejudice to the defendant." 407 U.S. at 530.

criminal action is before it, the trial court necessarily has, or has ready access to, the information which typically figures in a determination of that kind, such as the exact nature of the charges, when they were commenced, when the defendant obtained counsel, and the general history and current status of the action. See Morris v. Slappy, 461 U.S. at 11-12; Barker v. Wingo, 407 U.S. at 530-33. It is therefore able to render a decision based upon accurate information in a relatively efficient manner.

In light of this, it is in the interest of judicial economy to require that a pre-trial detainee enforce his Sixth Amendment rights as part of his criminal action. This result obviates the need for another tribunal, which has

little or no familiarity with his criminal action, to expend time, effort and resources gathering and scrutinizing the relevant information. It also minimizes the possibility that a different tribunal will render a decision based on erroneous or mistaken information.

The criminal court not only has the best capability for making an informed decision, but it has an inherent interest in doing so because it is charged with ensuring the integrity of the due process afforded a criminal defendant. Since deprivation of a defendant's Sixth Amendment rights may require repetition of the process, see United States v. Morrison, 449 U.S. 361, 364-65 (1981), resulting in additional

expenditure of time, effort and resources for all concerned, or may mean that a culpable person is not brought to justice,[25] the Court has an interest in properly resolving any claim by a pre-trial detainee that a transfer to another place of incarceration has deprived him of the Sixth Amendment rights dicussed here.

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[25]In Barker v. Wingo, 407 U.S. at 523, this Court observed that the remedy for denial of the right to a speedy trial is a comparatively harsh one, dismissal of the charges.

D. Creation of a Separate System to Safeguard a Defendant's Sixth Amendment Rights Is Likely to Produce Undesirable Confusion and Conflict

The separate system contemplated by the Court of Appeals to safeguard a defendant's Sixth Amendment rights is not only pointless, it can lead to practical problems which cannot be overlooked. Where, as here, a pre-trial detainee is transferred to another prison on an emergency basis, he would be able, following that transfer, to challenge the action as violative of his Sixth Amendment rights before two different tribunals--the court in which criminal charges are pending, in the manner we have previously discussed, as well as in the post-transfer hearing mandated by the Court of Appeals before a different tribunal independent of the

prison system. Very possibly, two different decisions may be reached. The criminal court may, after review of the record of his case to date, conclude that the transfer is permissible while the other tribunal may conclude it is not. In that situation, prison administrators would be at a loss to know what action they take.

Furthermore, the possible conflict resulting from implementation of the separate system established by the Court of Appeals also raises other potential complications such as what preclusive effect the transfer-related hearing may have in other litigation including the detainee's criminal action and matters such as civil rights suits. Where, as we have discussed above, issues of fact are resolved in a conflicting manner by the different

tribunals, confusion will invariably result as to what should be considered the true facts of the case.

In light of these potential complications and the fact that a detainee has other available means to enforce his Sixth Amendment rights, it fairly can be concluded that the additional requirement of transfer-related due process mandated by the Court of Appeals presents the potential for more harm than good and, therefore, should not be endorsed by this Court.

II. IF DESPITE THE FOREGOING REASONS THIS COURT CONCLUDES THAT A PRE-TRIAL DETAINEE SHOULD BE AFFORDED THE ADDITIONAL PROCESS MANDATED BY THE COURT OF APPEALS, THE COURT SHOULD ALSO CONCLUDE THAT IT IS THE OBLIGATION OF COUNTY NOT STATE OFFICIALS TO PROVIDE THAT PROCESS.

We have advanced here numerous reasons why this Court should reverse the decision of the Court of Appeals in this case. If notwithstanding those reasons, this Court determines that the process mandated by the Court of Appeals should have been provided to Yurky, it should affirm that court's related conclusion that it was Eichenlaub's responsibility, not the state prison officials', to ensure that the necessary process was provided.[26]

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[26]As we have mentioned previously, the Court of Appeals affirmed the conclusion of the District Court that

(FOOTNOTE CONTINUED ON NEXT PAGE)

This requirement is both logical and practical. In cases of non-emergency transfers, there is no question that it is the responsibility of county officials to provide the prisoner with the process due. Eichenlaub has never disputed this. In emergency situations, the same considerations obtain, only the time sequence is different.

As the officials who seek to remove a prisoner from their custody, county prison authorities have first-hand knowledge of the reasons for which

(FOOTNOTE CONTINUED)

Yurky was not denied the effective assistance of counsel as the result of his transfer. Yurky did not seek review of that decision and therefore it must now be viewed as final. Because it has been determined that he suffered no actual harm as the result of a transfer without process, at most he can recover only nominal damages for a denial of due process here. See Carey v. Piphus, 435 U.S. 247, 266-67 (1978).

the transfer is being carried out and, therefore, are best able to articulate the need for the transfer before the appropriate tribunal.

Officials of the state prison are in an entirely different position. Since they have no part in arranging the transfer of a pre-trial detainee, but only accept him into their custody, they must necessarily rely on information relayed to them by the county surrounding the need for the transfer.[27]

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[27]The Court of Appeals' decision is also consistent with the uncontroverted record which reflects that under the state's administrative procedures which were in effect at the time of Yurky's transfers, county prison officials were responsible for ensuring that any process due a detainee be provided, including in situations of emergency transfers. See (Declaration of Glen R. Jeffes, at ¶¶ 7-8 and Exhibit I).

In view of these considerations, the Court of Appeals correctly concluded that transferring county officials should be obliged to satisfy applicable due process requirements.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Court of Appeals as to petitioner; if however, the Court affirms the Court of Appeals' judgment as to petitioner, it should also affirm its judgment as to the state prison officials.

Respectfully submitted,

LeROY S. ZIMMERMAN
Attorney General

AMY ZAPP
Deputy Attorney General

JOHN G. KNORR, III
Senior Deputy Attorney General

ANDREW S. GORDON
Chief Deputy Attorney General
Chief, Litigation Section

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

ADDENDUM

RELEVANT PROVISIONS OF
PENNSYLVANIA PRISON REGULATIONS

37 Pa. Code §§ 93.3, 93.11-93.14, 93.21-93.26, 93.71-93.74

(NOTE: The various provisions of the administrative regulations reproduced here were those in effect for all times relevant to this action. However, since that time, many have been amended or decodified and do not reflect present prison regulations.)

§ 93.3. Attorneys.

(a) Attorney visits to inmates shall be governed by the provisions of §§ 93.71-93.76 of this title (relating to visiting privileges) with the following exceptions:

(1) The confidentiality of the attorney-client relationship shall be honored; personnel shall not be stationed in such a manner as to be able to overhear normal conversation.

(2) Visits other than during normal visiting hours shall be arranged with the superintendent, or his designated representative.

(3) Attorneys other than those designated on the approved visiting list of the inmate shall be permitted to visit with inmates upon the request of the inmate if they are properly identified.

(b) For the purposes of this section, an attorney shall include all members of the Bar or of any of the courts of this Commonwealth. It shall also include attorneys admitted to practice under rule 12 1/2 of the Supreme Court of this Commonwealth and law students permitted to practice in accordance with rule 12 3/4 of the Supreme Court of this Commonwealth if there is compliance with the following provisions:

(1) Before being granted access to any inmate, such attorney or law student shall be required to prove his identity, and shall personally deliver to the superintendent or other designated officer, a letter from an attorney of this Commonwealth setting forth the following information:

(i) The name of the inmate to be interviewed or assisted.

(ii) The name of the attorney or law student and a statement by the attorney that such person has been certified in accordance with rule 12 1/2 or 12 3/4.

(iii) A statement by the attorney that the named person is acting under the general supervision of such attorney.

(iv) Such letter shall by [sic] made a part of the file of the inmate and subsequent access to the same inmate by the same person shall be permitted without requiring an additional letter.

(2) An attorney or law student permitted access to an inmate under paragraph (1) of this subsection shall be treated in all respects as an attorney during his visits to the institution.

(c) The Philadelphia Voluntary Defenders Association offers its legal services to inmates sentenced from Philadelphia County at all institutions except Pittsburgh. The institution shall cooperate with the following provisions:

(1) The institution shall provide a copy of the classification summary which they may take with them to be returned when they are finished.

(2) The institution shall refer any additional Philadelphia County cases to them.

(d) Inmates are not forbidden to assist others in preparing legal papers. In no case shall inmates be compensated in any manner by the inmates for whom assistance is rendered.

(e) An attorney may bring a tape recorder into the institution to interview his client if he has a court order restricting its use to the preparation of his case and not for other publication or broadcast.

TELEPHONE CALLS

§ 93.11. Purpose.

(a) The policy of the Bureau is to maximize availability of meaningful contact with family, relatives, friends, and others concerned with the overall treatment program of the individual inmate. This is essential to the rehabilitation and reintegration process in terms of morale, maintenance of family life and community ties. Therefore, §§ 93.11-93.14 of this Title (relating to telephone calls) sets forth standardized rules governing telephone calls by inmates.

(b) These provisions constitute privileges for the residents of the Regional Correctional Facility at Greensburg and any subsequently established regional correctional facility.

§ 93.12. Policy.

Phone calls may be permitted. This shall be an individual decision made by the counselor on the basis of treatment rationale.

§ 93.13. Permissible telephone calls.

(a) Frequency. The frequency of telephone calls is an individual matter which shall be the decision of the counselor. On occasions when the number of calls may be excessive, such as major holidays, the number of calls per resident may need to be limited.

(b) Length of telephone calls. Telephone calls shall generally be limited to a duration of five minutes.

(c) Scheduling. Calls shall be scheduled through the counselor and placed during the counselor's working hours if possible. Otherwise, evening calls may be scheduled. A limit to the number of calls which can be handled with the equipment available should be established by the Director of Treatment. Generally, it is not necessary to schedule calls in advance of the day the call is desired, except weekends and holidays when the counselor will not be on duty.

(d) Place of telephone calls. During working hours, telephone calls shall be made from the office of the counselor. During nonworking hours calls shall be made from any convenient location as designated by the ranking officer. If possible, provisions for privacy shall be made.

(e) Records. The staff person completing the call may wish to record this on Form JBC-14, although this is not required. The decision to record calls should be based on treatment significance or cases which are making excessive use of the phone.

(f) Payment. Collect calls should be encouraged. Time and charges may be requested and a cash slip signed by the resident providing the existence of sufficient funds has been established prior to the call.

§ 93.14. Emergency telephone calls.

(a) If there is a serious illness, hospitalization, or death of a family member of an inmate, a telephone call shall be permitted immediately. Any resident, regardless of status, may make such a call.

(b) Any employe may be designated to supervise such a call. Authorization should come from the counselor or ranking officer. On such calls no time limit need be observed.

(c) A repeat attempt to reach a party shall be permitted for all calls. For regular calls, the inmate may try again later on the sequence of scheduled calls. Priority may be given to emergency calls.

(d) Phone calls by a resident to a resident who is a relative confined in another State Correctional Facility may be made upon the recommendation of both counselors and the approval of the RCF Director of Treatment and the Superintendent of the SCI or Director of Treatment of the other RCF. Such calls must be scheduled five days in advance, and the call must be completed during the regular working day.

MAIL PRIVILEGES

§ 93.21. Purpose.

The policy of the Bureau is to maximize communication between the inmate and the family, relatives, friends, news media, and others concerned with the overall program of the individual inmate. This is essential to the rehabilitation process in terms of morale, maintenance of family ties, and reintegration into the community.

§ 93.22. Free and allowable letters.

(a) Postage-free correspondence. Each inmate shall be permitted, without cost, to mail ten one-ounce first-class letters or the equivalent thereof in postage per month, up to $1.50. This amount is not transferable from month to month or from inmate to inmate.

(b) Postage-paid by the inmate correspondence. There shall be no limit on the number of postage-paid letters an inmate may send.

(c) Records. A record shall be kept in the mail room of the total number of letters mailed each month by the inmate, reflecting both postage-free letters and those for which the inmate has paid postage.

§ 93.22. Correspondents, restrictions, and procedure.

(a) All inmates shall be permitted to correspond with friends, family members, attorneys, news media; legitimate business contacts, and public officials. There shall be no limit to the number of correspondents.

(b) The following restrictions will apply:

(1) Correspondence with inmates of other institutions, ex-inmates, probationers, or victims of the criminal acts of the inmate will not be permitted except upon special approval of the Superintendent.

(2) Correspondence containing threatening or obscene material, as well as correspondence containing criminal solicitations or furthering a criminal plan is prohibited.

(3) Inmates shall refrain from writing to persons who have stated in writing that they do not wish to receive mail from such inmates; provided, however, that this shall not be interpreted to restrict the right of inmates to correspond with public officials with respect to the official duties of the latter.

(c) Outgoing mail shall not be read, censored, or reproduced except as provided for in § 93.25 of this title (relating to security). It shall be checked as to addressee to determine if it is in accordance with the provisions of subsection (b) of this section.

(d) Incoming mail shall not be read, censored, or reproduced except as provided for in § 93.25 of this title (relating to security). It shall be opened and examined for contraband. Money orders, certified checks, or cash shall be recorded indicating the nature of receipt, the sender, the amount received, and the date. Personal checks, unless certified, shall be returned to sender. The institution shall not be responsible for cash sent through the mails and the sender, if known, shall be notified accordingly. The inmate shall be notified of all

monies received. Letters containing contraband shall be held for further inspection and disposition by the Deputy Superintendent for Treatment Services and Operations.

(e) Inmates shall seal and place all correspondence in the mailroom boxes provided in each housing unit.

(f) All outgoing mail shall include, on the envelope, the inmate's full committed name and institutional number, printed legibly. Envelopes not bearing this information shall be opened and returned to the sender.

(g) When a check from the inmate's account is to be placed in outgoing mail, the inmate shall fill out a Form JBC-138A, and his signature shall be witnessed by a staff member. This shall then be attached to an unsealed envelope and placed in the mail box provided and processed through inmate accounting in accordance with internal institution procedures.

§ 93.24. Privileged correspondence.

(a) Inmates shall be permitted to send sealed letters to the following persons:

(1) Elected Federal, State, or local officials.

(2) Appointed Federal or State officials.

(3) Lawyers.

(b) Mail to these persons shall not be opened, read, censored, or reproduced except as provided in § 93.25 of this title (relating to security). Mail from these persons shall be delivered to the housing unit officer, opened by the officer in the presence of the addressee and checked for contraband as a precaution in case the mail is not from whom it is purported to be. Mail from these persons shall not be read, censored, or reproduced except as provided for in § 93.25 of this title (relating to security).

§ 93.25. Security.

(a) The institution shall retain the right to read nonprivileged mail upon the approval of the Superintendent only when there is reason to believe that security may be impaired or that this directive is being abused.

(b) The institution shall retain the right to read privileged mail, as set forth in § 93.24 of this title (relating to privileged correspondence), only upon the written order of the Superintendent with the written approval of the Commissioner of Correction and of the Attorney General when there is reason to believe that there is a threat to security or that there is criminal activity.

(c) A log shall be kept of instances where mail is read and the inmate shall be notified immediately, unless such notification would impede investigation of criminal activity, in which case he or she shall be notified at the completion of the investigation.

(d) Mail may be reproduced upon written order of the Superintendent with the written approval of the Commissioner of Correction and of the Attorney General, only in those cases where it is determined that there is good reason to believe that the correspondence is evidence of criminal activity.

(e) An item of correspondence which is reviewed in compliance with subsections (a) and (b) of this section, which appears violates § 95.23(b) of this title (relating to correspondence, censorship, and contents) shall be reviewed by the Deputy Superintendent for Operations who shall notify the inmate and the sender in cases where the inmate is not the sender when the letter is rejected. The letter shall be held for at least 48 hours, excluding weekends and holidays, after the receipt of such notification by the sender to permit reasonable opportunity to protest the decision. The Superintendent shall review all complaints received and the letter and make a final decision of whether the letter shall be rejected. If the letter is rejected it shall be returned to the sender by the Superintendent.

(f) An inmate who violates institutional mail regulations shall not lose his basic correspondence privilege. However, a serious violation may result in close scrutiny of an individual's mail until such time as it is determined that further violations will not occur.

§ 93.26. Handling and distribution of mail.

(a) Outgoing mail. Outgoing mail placed in housing unit mail boxes shall be collected each morning, Monday through Friday. Every effort shall be expended to assure that such mail is delivered to the United States Postal Service on the same day.

(b) Incoming mail. Incoming mail shall be processed as follows:

(1) Official mail and inmate mail shall be separated.

(2) Inmate mail shall be checked against the inmate master list.

(3) If an inmate has been transferred or released, mail shall be forwarded unopened to new address if known. If no forwarding address is available mail shall be returned unopened to the sender.

(4) Privileged correspondence shall be delivered unopened to the respective housing unit officer.

(5) All remaining mail shall then be opened, examined, and distributed to the inmate.

(6) All mail shall be delivered to the inmate as soon as possible after processing.

(7) It shall be the responsibility of the inmate who may receive letters of a disturbing nature to bring the matter to the attention of the housing unit officer and arrangements will be made for the inmate to discuss this with his caseworker.

(c) Certified or registered mail. Certified or registered mail shall be processed as follows:

(1) Each institution shall establish procedures in cooperation with the local United States Postmaster for the processing of certified or registered mail.

(2) Determination of mail to be sent by these methods shall be the responsibility of the inmate.

(3) The inmate must have funds available in his personal account and an approved cash slip for such postage payment.

VISITING PRIVILEGES

§ 93.71. Purpose.

The policy of the Bureau of Correction is to encourage opportunities for visits with family members, relatives, and friends. This is essential to morale, sustaining family life, and insuring ties in the community after release.

§ 93.72. Standardized rules governing visits.

(a) Approved list of visitors. A list of approved visitors shall be established during initial classification period and recorded on the Form JBC-311. The basic list may contain up to 20 names. Inmates who can show that they have more than 20 regular visitors may add additional names to their approved lists. Members of a family living at the same address shall be counted as one name. Except for members of an inmate's immediate family, a minor's name may be placed on the approved list only with permission of the minor's parents or guardian, on the Form JBC-313. Children under 12 years of age need not be placed on the official list. Changes or additions to the approved list may be made in accordance with established procedures on the Form JBC-312. The name of a visitor may be removed for good cause upon authorization by the Superintendent.

(b) Spiritual advisor and attorney. Designation by an inmate of an ordained spiritual advisor or an attorney, or both, may be made at any time. Such designation shall be in addition to the names on the approved list and shall not be counted against the total of 20.

(c) Ex-inmates. An ex-inmate who is a relative may visit with special permission of the Superintendent.

(d) Recording of visits. All visits shall be recorded on an inmate's visiting card, Form JBC-320.

(e) Registering of visitors. All visitors shall register in and out of the institution on the Form JBC-325.

(f) Visiting clothing. Separate facilities shall be provided at the male institutions whereby an inmate appearing for a visit can be searched, given a clean shirt and trousers, with reverse procedure followed upon completion of the visit. At the female institutions personal clothing may be worn with provision for searching the inmate following visit.

(g) Initial visits. The inmate's first visit after admission is important and, whenever possible, shall be scheduled following the medical quarantine period and shall be held in the presence of a staff caseworker.

(h) Disciplinary cases. Visits for inmates in disciplinary status shall be as follows:

(1) Administrative custody: Same as general population.

(2) Special adjustment unit: Visits shall be denied if the reason for disciplinary action is directly related to a violation of the visiting rules in which case visitors shall be informed by a counselor. In all other instances, a counselor shall first talk with the visitor, explain the reasons for the disciplinary measure, and advise on a constructive course of action. Depending upon the reaction of the visitor and the inmate to the situation and based upon the counselor's recommendation, the visit may or may not be held, subject to the final concurrence of the Superintendent or his designated representative.

(3) Capital cases: Prior to the Governor's Warrant being issued, visiting privileges shall be the same as for the general population. After the Governor's Warrant has been issued, visits are restricted by law to legal counsel, spiritual advisor, and members of immediate family, unless otherwise directed by Court Order.

(i) Visiting room officers. The public relations aspect of visiting contacts shall be given special attention. All visitors shall be

treated courteously and with understanding. It is important that officers present a good appearance, be pleasant, and be tactful. They shall be alert to any problems that may arise and be able to refer such problems to appropriate officials.

§ 93.73. Number, time, and place of visits.

Inmates shall be permitted to have visits as often as the situation at the institution will allow. Visits shall be of sufficient duration to be of value to both the inmate and visitor. Each inmate and visitor shall be provided a copy of internal visiting rules in accordance with the following:

(1) Visiting days. Visits shall be permitted every day of the year.

(2) Visiting hours. Morning and afternoon visiting hours shall be maintained. Evening visits may be maintained.

(3) Length of visits. Visits shall be of no less than one hour in duration. Longer periods may be allowed depending on inmate's program status and available space.

(4) Frequency of visits. One visit per inmate per week shall be permitted. Additional visits may be permitted unless the inmate's program status makes it impractical.

(5) Number of visitors at one time. The number of visitors an inmate may have at any one time shall be limited to five. A larger number may be permitted depending upon available space.

(6) Special visit. Provisions shall be made for the approval of a special visit at infrequent intervals of persons who may not be on approved list who have come a substantial distance and for a family visit to a seriously ill or injured inmate. Special visits shall be approved only by the Superintendent or Deputy Superintendent.

(7) Setting for visits. The setting for visits shall conform with the following provisions:

(i) Visits shall be held in a relaxed manner under official observation.

(ii) Visiting rooms shall be set with living room type furnishings.

(iii) An appropriate outdoor area furnished with picnic tables should also be provided.

(iv) The inmate and visitors may embrace when meeting and departing and may sit side-by-side. The inmate may hold small children on his lap.

(v) The inmate and visitors may eat or drink items sold at the institution.

(vi) Family-day visits are encouraged whereby the visitors will be permitted to bring a basket lunch and share it with the inmate.

§ 93.74. Security.

(a) If any visit is a threat to the security and order of the institution, such visits shall be disallowed.

(b) All outside visitors are subject to search before and after visiting.

(c) Any visitor who cannot produce identification or who falsifies identifying information shall not be allowed in the institution.

(d) A visit may be restricted or special security precautions imposed for violation of visiting rules or as warranted by the temperament of the inmate involved.

(e) Restriction of visiting privileges shall not be used as a disciplinary measure for an unrelated institutional rule infraction.